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**Issue Date: 26 July 2007**

In the Matter of

L. R.[1]
Claimant

Case No. 1998-LHC-02090
OWCP No. 14-126603

v.

STEVEDORING SERVICES OF AMERICA
Employer

and

HOMEPORT INSURANCE CO.
Carrier

## DECISION AND ORDER ON REMAND

*Case History*

This is a claim for compensation resulting from an injury to the claimant's upper back, neck and left arm arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. ("the Act") on remand from the Benefits Review Board. Initially, claimant was alleging that he was permanently and totally disabled. On April 1, 2003, I issued a *Decision and Order* ("D&O")[2] finding the claimant entitled to compensation for a period of temporary partial disability and three periods of temporary total disability. But I denied compensation, both temporary and permanent, subsequent to July 12, 2000 because I found that the claimant was physically capable of returning to his previous employment as a longshoreman but was prevented from doing so by his own union, not by the employer. I also found that the claimant reached maximum medical improvement on November 22, 2000.

The claimant appealed, and the employer cross-appealed, to the Benefits Review Board. On April 29, 2004, the Board issued its *Decision and Order* ("Board's D&O"). The Board held,

[1] Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Longshore and Harbor Workers' Compensation Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

[2] To the extent that it has not been vacated by the Benefits Review Board, the D&O is incorporated by reference into this decision.

*inter alia*, that claimant's initial period of temporary total disability ended on May 3, 1998 rather than May 1, 1998; that claimant's actual earnings for the periods between May 4, 1998 and September 28, 1998, and December 2, 1998 to August 4, 1999, were representative of his wage-earning capacity; that claimant was entitled to compensation subsequent to July 11, 2000 despite the fact that the was physically capable of returning to work, since work as a longshoreman was unavailable to him;[3] and that claimant's average weekly wage was determined incorrectly. The case was remanded to me "to re-open the record for evidence from which [I] can determine claimant's average weekly wage, and to address claimant's entitlement to compensation after July 11, 2000." BRB D&O, slip op. at 12.

Both parties moved for reconsideration of the Board's decision, and on February 28, 2005, the Board issued its *Order on Motion for Reconsideration En Banc* ("Board's Order"). The Board's Order reaffirmed its holding in the Board's D&O.

On remand, I held another hearing, in Portland, Oregon, on October 24, 2005. At that hearing, claimant testified that he retuned to work as a longshoreman on December 3, 2001, only days after the previous hearing (TR 89). He stated that right after the November 28, 2001 hearing, he went to the dispatcher and asked to be put back to work within his limitations, and just like that he was able to go back to work (TR 89-90). The parties failed to inform me of this rather significant development while the case was pending before me the first time;[4] and it

[3]The BRB's decision in this case relies on its misconception of the genesis of claimant's disability subsequent to his reaching maximum medical improvement. The Board states that claimant's union refused to allow him to return to work as a longshoreman "as a result of safety concerns related to the sequelae of his work injury." *See* Board's Order at 1 (Feb. 28, 2005). *See also id*. at 2 ("Claimant's union determined . . . that his neck-tongue syndrome created safety risks on the waterfront." "after claimant lost his longshore job due to his neck-tongue syndrome . . . ." "as the unavailability of the suitable alternate employment claimant performed after his initial work injury was due to the effects of that injury, *i.e*., his neck-tongue syndrome . . . ."). But this is not the case. Claimant's medical restrictions after he reached maximum medical improvement related primarily to his preexisting problems with his right knee imposed by Dr. Tilson in 1985. The only changes added in 2000 due to the neck-tongue syndrome were no work above shoulder level and avoiding work at heights or in situations where sudden arm weakness could cause a fall (D&O at 10). In fact, these additional restrictions did not affect claimant's ability to work on the waterfront.

[4] In fact, claimant clearly indicated that the status quo was being maintained, stating in his February 4, 2002 post-hearing brief that "[t]his is a case of permanent total disability because [the claimant] cannot return to his regular job as a B longshoreman due to the effects of his injury of October 22, 1997. Although he might be able to perform some of the jobs on the waterfront some of the time, this option is not available to him at the present time." *Claimant's Closing Argument*, February 4, 2002, at 18 (citation omitted). *See also id.* at 19, lines 5-12. Yet the claimant had returned to his longshore work, and the only reason he was not working as a longshoreman on February 4, 2002 is because he suffered a non-work related back injury after returning to longshoring. The claimant's ability to return to work was at the heart of this case. My belief that he was not working was a matter that greatly troubled me, and I had tried to

appears that they kept this information from the Board as well. Shortly after returning to work on December 3, 2001, claimant incurred a non-work-related back injury which kept him off work for the first quarter of 2002. *See* CX 45, at 45 6-57; EX 172-83. He returned to work on April 3, 2002, and worked fairly irregularly through the second quarter of 2002 (CX 45, at 457). Claimant worked regularly from then on (subject to periods missed due to other injuries). He became an A-registration longshoreman on August 31, 2002 (EX 157). He earned about $19,000 in the last half of 2002, $58,881.85 in 2003, $46,7700.63 in 2004, and $35,589.63 through September 30, 2005, when the payroll records in evidence end (*see* CX 45; EX 209).

*Average Weekly Wage*

In its decisions, the Board held that I calculated claimant's average weekly wage incorrectly. The Board clearly is correct, since I acknowledged in my decision that the figure I selected had no basis in the record other than that, at one point, claimant proposed $1,037.04 as his average weekly wage and employer paid claimant compensation using $1,037.04 as his average weekly wage. I took this approach because the record was inadequate to make a reasonable finding regarding claimant's average weekly wage under either §10(b) or 10(c) of the Act, and $1,037.04 seemed a fair compromise. But the parties apparently did not want to compromise, and both sides objected to $1,037.04 as the average weekly wage.

On remand, it must first be determined whether to use §10(b) or 10(c) in determining claimant's average wage. Since he worked for only a short period as a B registered longshoreman, a classification which meant much greater earnings than the claimant received as a casual worker, relying only on his actual wages in the year prior to his injury to determine his average weekly wage under §10(a) would have been unfair. Under §10(b), the wages of "an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment" are used to calculate the claimant's average weekly wage. To apply §10(b), there must be evidence of the wages of another B registered longshoreman from October 22, 1996 to October 22, 1997. But there was no such evidence in the record when I wrote my initial decision in this case and there is none now (*see* D&O at 21). Therefore, claimant's average weekly wage must be calculated under §10(c).

As a preliminary note, the parties seem to have forgotten that a claimant's average weekly wage is based on his wages for the year *prior* to his injury. Examples of how the parties have lost sight of this are the statement in *Claimant's Reply Closing Argument* that "[w]hat the court has to determine is how much income [the claimant] would have earned from March 1, 1997 through February 28, 1998" (i*d*. at 2), and employer's contention that the average weekly wage should be based on the earnings of the 13 co-workers who became B-registration longshoremen the same time as claimant did ("claimant's cohort") from March 1, 1997 through the end of 1998 (*Stevedoring Services of America's Closing Argument After Hearing on Remand*

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remedy the situation by encouraging the parties to avail themselves of the Port's ADA accommodation procedure. That claimant returned to work on December 3, 2001 makes much of my discussion of the claimant's inability to work due to his union's refusal to let him return to work moot. I have no idea why the parties withheld this information from me, but to say the least I am not pleased.

– "SSA's Brief" - at 3). In support of their average weekly wage arguments, the parties have presented me with all sorts of evidence of longshoremen's earnings subsequent to the claimant's October 22, 1997 injury. This evidence has limited probative value. To the extent the evidence relies less on post-October 22, 1997 wages, the more probative that evidence is in regard to determining the claimant's average weekly wage.

Claimant contends that his average weekly wage should be based on the earnings of the three highest paid longshoremen in claimant's cohort for the one-year period from March 1, 1997, the date claimant's cohort became B-registered, through February 28, 1998. There are several problems with this approach. First, the one-year period prior to the claimant's injury runs from October 22, 1996 through October 22, 1997, not from March 1, 1997 through February 28, 1998. Second, claimant's basis for including only certain employees' earnings is his self-serving representations, and similar representations from another employee, Donald Stykel, that he is a very motivated worker and the employees whose earnings he argues should be used in calculating his average weekly wage are also very motivated workers, whereas the ones he excluded are not. But these characterizations do no necessarily coincide with the workers' earnings. For example, Robert Ensunsa allegedly was not one of the highly motivated workers (*see* TR 50), yet he earned over $63,000 from March 1, 1997 through February 27, 1998 (EX 168, at 1474-76, 1489), making him the fourth highest earner in claimant's cohort for that period. Norma Ericson (nee Langman), who was represented as being at the hiring hall all the time (TR 51), earned less than half of what the highest earners made in the weeks the claimant actually worked as a B-registered longshoreman in 1997, and was no better than the middle of the pack in earnings from March 1, 1977 through February 27, 1998. Moreover, Mr. Stykel did not know a Gerry Thornton (he knows a Gary Thornton, but the record fails to disclose whether he is referring to the same person) or Robert Rogers (TR 48, 50), and apparently knows little about Walter Butler (TR 48). Therefore, he cannot know how often these men came down to the hiring hall looking for work. He also testified that Shauna Souders "hardly ever showed up." (TR 50; *see also* TR 124). Yet her earnings in the weeks claimant worked in 1997 were in the middle of the pack of the workers in claimant's cohort; and despite "hardly ever show[ing] up" she managed to earn almost $53,000 from March 1, 1997 through February 27, 1998. Moreover, judging from the earnings of claimant's cohort in 1996, prior to their becoming B-registered, claimant was not one of the highly motivated workers. In actuality, he earned less in 1996 than any of the other longshoremen in his cohort (*compare* EX 161 *with* EX 158-60; 162-71). Further, all of the workers did not have the same qualifications. For example, the claimant testified that Mr. Stykel had skills he did not have, and accordingly worked more often (TR 2005 at 194; *see also id*. at 53-54). I find that there is no reasonable basis to include only some members of the group of longshoremen who became B-registered at the same time as the claimant when attempting to calculate claimant's average weekly wage under §10(c).

The evidence filed on remand has not changed my mind that, despite its deficiencies, the most probative evidence in the record to serve as the basis for a determination of claimant's average weekly wage is the 1997 average earnings of B-registration longshoremen in claimant's union local (EX 9; *Decision and Order* April 1, 2003, slip op. at 21). This data includes only two months of wages subsequent to the claimant's date of injury; covers a full year's earnings for longshoremen who are B-registered; and is based on the earnings of a much larger number of B-

registered longshoremen than claimant's 14 member B-registration cohort. Accordingly, I find that claimant's average weekly wage is $877.96.

In computing the claimant's average weekly wage, the Board instructed me to include vacation pay in the calculations. But the 1997 earnings for the B-registration longshoremen on which I based the average weekly wage includes vacation pay (presumably vacation pay earned in the preceding year) as well as applicable holiday pay (*see* EX 9, at 30a). Although there might be a minute increase in the average weekly wage if vacation pay of the B-registration longshoremen earned in 1997 but paid in 1998 is substituted for vacation pay earned in 1996 but paid in 1997, the record does not provide the data to make that calculation. The Board also instructed me to factor into claimant's average weekly wage "a four percent raise claimant received shortly before his October 1997 work injury . . . ." BRB D&O, slip op at 10. But first, the raise the Board is referring to was a yearly cost of living type wage increase for all longshoremen regardless of registration status, not just the claimant (*see* CX 5, 50). Unlike the increase in claimant's earning capacity due to his elevation to B-registration status, which is an overriding consideration in determining claimant's average weekly wage, his four percent raise in 1997 did not reflect a promotion or anything else out of the ordinary. Claimant and the other longshoremen covered by the PMA-ILWU contract receive similar raises virtually every year. Second, this wage increase went into effect on June 28, 1997, almost four months prior to claimant's injury. Since the average weekly wage here is based on the wages paid to all B-registration longshoremen for calendar year 1997, the higher wage rate was in effect for slightly more than half that year. Therefore, it would have been reflected in their earnings and in my average weekly wage determination.

*Nature and Extent of Disability*

In the D&O, I found that claimant was temporarily totally disabled from October 23, 1997 through May 1, 1998. He is entitled to compensation based on an average weekly wage of $877.96 for this period. I found that claimant returned to work on May 4, 1998, working until September 28, 1998. During this period, he earned an average of $859.14 a week adjusted to the pre-injury basis, providing a loss of wage-earning capacity of $18.82 per week over this period. He is entitled to compensation for temporary partial disability at that rate for 21 2/7 weeks. Claimant was then temporarily totally disabled from September 29, 1998 through December 1, 1998. He returned to work on December 2, 1998 and worked through August 5, 1999 (other than the period from April 9 through June 1, 1999, when he was off work following non-work related carpal-tunnel surgery), averaging earnings of $1148.11 per week. Since these earnings, even when reduced to 1997 levels, exceed his average weekly wage, claimant is not entitled to compensation for these 27 4/7 weeks. Claimant then suffered the neck-tongue attack at work. He was temporarily and totally disabled from August 6, 1999 through July 11, 2000 due to the neck-tongue syndrome, and is entitled to compensation for this entire period.

Then we get to the period which caused most of the controversy in this case, the period beginning on July 12, 2000. On that date, claimant was released to return to limited duty by Dr. Won, but was precluded from working by his union. I held that claimant was not entitled to compensation for this period, but the Benefits Review Board reversed my holding and directed me to consider employer's evidence regarding suitable alternate employment subsequent to July

11, 2000. In that regard, the employer offered the reports and testimony of a vocational rehabilitation counselor, Roy Katzen.[5] It was, and still is, Mr. Katzen's opinion that there are numerous jobs, including many longshore jobs, which claimant is physically capable of performing which are available now and were available in 2000. Since claimant was precluded from working as a longshoreman, only the non-longshore jobs will be considered.

Mr. Katzen concentrated on three types of positions: parking lot cashier/attendant, security guard/gate guard, and light production/assembly (*see* EX 153, at 16-17). The first two are sedentary to light duty positions, whereas the light production/assembly jobs are considered to be in the light to medium duty category. Mr. Katzen explained that even with the claimant's restrictions, he would be able to perform all of these jobs, and his conclusion in this regard is consistent with the physical capacities evaluation claimant underwent on June 12, 2000 (EX 105). The production/assembly jobs were not readily available in November, 2001, but were plentiful in 2000; the parking lot cashier and security guard positions have been readily available continuously from August 2000 (*id.*). Entry level jobs in these areas paid from $7.00 to $9.50 an hour in 2001, when Mr. Katzen performed his labor market surveys. He stated that claimant would likely be paid $8.00 an hour at 2001 wage levels, and that is consistent with the data in his labor market surveys. Reducing these November, 2001 hourly wages to October, 1997 dollars equals $6.92.[6] Multiplying $6.92 by 40 provides a weekly wage-earning capacity of $276.80. Accordingly, claimant suffered a loss of wage-earning capacity of $601.16 per week from July 12, 2000 through December 2, 2001, and is entitled to compensation for permanent partial disability during this period.[7]

Claimant next contends that he is entitled to compensation for permanent partial disability for the period from December 3, 2001 until he became an A-registered longshoreman, and then for the period since he became A-registered to the present and continuing. Taking the earlier period first, the parties are in agreement that since the claimant's wage rate has increased between the date of injury and his return to work, the claimant's post-injury wage rate should be reduced to his pre-injury level to determine whether claimant has undergone a loss of wage-earning capacity. *See, e.g., Johnston v. Director, OWCP*, 280 F.3d 1272 (9th Cir. 2002). Even though claimant used September 11, 2002 as the date he became A-registered and employer applied the correct date of August 31, 2002, the parties agree that claimant's earnings during this

[5] I the D&O, I found that Dr. Katzen's opinion was entitled to much greater weight than that of claimant's vocational expert, who stated that the claimant was not capable of returning to work. The Board did not question this finding.

[6] I made this calculation by dividing the National Average Weekly Wage ("NAWW") in November, 2001, when Mr. Katzen performed his labor market surveys, by the NAWW in October, 1997, the date of injury, which showed that the NAWW in October, 1997 was 86.5% of the NAWW in November, 2001. I then multiplied claimant's likely 2001 hourly wage of $8.00 by .865 to determine the comparable hourly wage in 1997, which was $6.92.

[7] Claimant's contention that he could not perform non-longshore work because it would jeopardize his status as a longshoreman was rejected by the BRB (*see* BRB D&O, slip op at 8), and will not be revisited in this decision.

period equaled $13,009.34. To determine loss of wage-earning capacity, claimant divided the $13,009.34 by the number of weeks worked until September 11, 2002 (25 5/7) to arrive at his weekly wage ($520.37), and reduced this amount by nine percent, which he stated is the difference between claimant's average wage in 1997 of $25.18 and his average wage in the period December 3, 2001 to September 11, 2002 ($27.68) (*see Claimant's Closing Argument* at 18). Based on these calculations, he contends that his residual wage-earning capacity during this period is $473.54 a week. The problem with this calculation is that the claimant has not applied the wage rate in effect on the date of injury in determining how much his earnings from December 3, 2001 through August 30, 2002 should be reduced. Rather, claimant averaged the wage rate in effect when he became B-registered - $24.68 - and the hourly wage rate on the date of injury, which had been increased to $25.68. But since it is the claimant's loss of wage-earning capacity from the date of the injury that is being measured, the wage rate on the date of injury is the proper wage rate to compare to the wage rate when the claimant returned to work. Employer conducted the proper comparison of claimant's June 30, 2001 to July 28, 2003 wage rate - $27.68 – to claimant's hourly wage on October 22, 1997 - $25.68 - and determined that claimant's earnings from December 3, 2001 through August 30, 2002 had to be multiplied by a factor of 0.928 to reflect the wage rate at the time of injury (*see* SSA's Reply Brief at 16; SSA's Brief at 22). Based on its calculations, employer found claimant's wage-earning capacity during this period to be $503.03 per week, and his loss of wage-earning capacity to be $460.28 a week based on an average weekly wage of $963.13. However, I have determined that claimant's average weekly wage was only $877.96. Based on that average weekly wage, I find that claimant's loss of wage-earning capacity from December 3, 2001 through August 30, 2002 was $374.93. He is entitled to compensation based on that loss of wage-earning capacity for this period.

In regard to the period after he became A-registered, as a preliminary matter, whether the claimant's low back pain beginning in July, 2004 (*e.g.*, TR 2005 at 71, 176-77; CX 51) is related to his employment is not before me. This case concerns claimant's injury to his neck, upper back and left arm on October 22, 1997, not low back pain arising seven years later. Regardless, it is difficult to see how claimant contends he incurred a loss of wage-earning capacity since he became A-registered. A-registered longshoremen have the first choice of jobs, and if claimant was able to obtain work in jobs he was capable of performing while he was only a B-registered longshoreman, there is no doubt he could obtain jobs he was capable of performing once he became A-registered. Under either party's calculations (*see Complainant's Reply Closing Argument* at 20; SSA's Brief at 22-23), claimant's earnings as an A-registered longshoreman reduced to 1997 levels greatly exceed his average weekly wage of $877.96. Accordingly, he has not incurred a loss of wage-earning capacity since he became A-registered. Nevertheless, the BRB instructed me to consider the claimant's entitlement to a *de minimis* award in accordance with *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997) (*Rambo II*), despite the fact that claimant never requested a *de minimis* award when the case was before me the first time (*see* BRB D&O, at 8). On remand, claimant once again does not mention a *de minimis* award. But the employer concedes that a *de minimis* award is appropriate in this case, since the claimant, while having no current loss of wage-earning capacity, has a permanent condition which might, in the future, actually cause a loss of wage-earning capacity. *See* SSA's Reply Brief at 22. Accordingly, I find that the claimant has a one percent permanent partial disability for which the compensation equals $8.78 a week.

## ORDER

***IT IS ORDERED*** that:

1. The previous order issued on April 1, 2003 is ***vacated***.

2. The employer shall pay to the claimant:

a. Compensation for temporary total disability from October 23, 1997 through May 3, 1998, September 29, 1998 through December 1, 1998, and August 6, 1999 through July 11, 2000, based on an average weekly wage of $877.96.

b. Compensation for temporary partial disability from May 4, 1998 through September 28, 1998 based on a loss of wage-earning capacity of $18.82 a week.

c. Compensation for permanent partial disability from July 12, 2000 through December 2, 2001 based on a loss of wage-earning capacity of $601.16 a week.

d. Compensation for permanent partial disability from December 3, 2001 through August 30, 2002, based on a loss of wage-earning capacity of $374.93 a week.

e. Compensation for permanent partial disability from August 31, 2002 and continuing at a rate of $8.78 a week.

f. Medical benefits for the injuries sustained by the claimant on October 22, 1997.

Credit shall be given for all previous payments of compensation and medical benefits. Interest shall be paid on all unpaid compensation, if any, from the date due until paid in accordance with 28 U.S.C. §1961(a).

3. ILWU-PMA Welfare Plan shall have a lien on any payments of compensation which would otherwise be paid to the claimant until it has been reimbursed for the disability payments it has paid to the claimant.

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JEFFREY TURECK
Administrative Law Judge